

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEITH R. ZINN)	
Claimant)	
VS.)	
)	Docket No. 184,800
THE BOEING COMPANY-WICHITA)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Both the claimant and the respondent requested review by the Appeals Board of the March 13, 1996, Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on August 14, 1996.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Marvin R. Appling of Wichita, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record contained in the Award.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award. Additionally, on September 6, 1996, the parties filed a stipulation before the Appeals Board following oral argument which contained a letter from the respondent in reference to the respondent's contribution to the claimant's pension benefits.

ISSUES

Respondent asked the Appeals Board to review the following issues:

- (1) Nature and extent of claimant's disability.
- (2) Whether the Administrative Law Judge correctly calculated the retirement benefit offset as required by K.S.A. 44-501(h).

Claimant requested Appeals Board review of the following issue:

- (3) Whether the retirement benefit offset required by K.S.A. 44-501(h) is constitutional.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) The parties stipulated that claimant suffered a work-related back injury while employed by the respondent on July 19, 1993. Respondent provided medical treatment for claimant's injury, first through Louis S. Morgan, M.D., and then through Lawrence R. Blaty, M.D., board certified in physical and rehabilitation medicine. Dr. Blaty provided claimant with conservative treatment in the form of physical therapy and medication from August 20, 1993, until he released claimant to return to work with permanent restrictions on December 20, 1993.

Dr. Blaty testified in this matter and opined that as a result of claimant's back injury he had sustained a 7 percent permanent functional impairment. Dr. Blaty also concluded that claimant had preexisting spinal stenosis and degenerative disc conditions in both the lumbar and thoracic areas of his back. Dr. Blaty opined one-half or 3.5 percent of claimant's 7 percent permanent functional impairment rating was due to those preexisting conditions.

Claimant testified he returned to the respondent on December 19, 1993, with Dr. Blaty's work release which contained permanent restrictions. At that time, the

respondent did not return claimant to work but immediately placed him on layoff. Since claimant was 63 years of age and eligible for retirement benefits, he made the decision to voluntarily retire from his employment with respondent. Claimant testified he receives monthly retirement benefits from the respondent in the amount of \$402 and monthly retirement benefits from social security in the amount of \$686 per month.

The regular hearing in this matter was held on December 13, 1995, and claimant testified he was enjoying his retirement. He also testified he had applied for only one other job since he was released to return to work for the respondent.

The Administrative Law Judge found claimant was entitled to permanent partial general disability benefits based on work disability as defined in the post July 1, 1993 amendments to K.S.A. 44-510e(a). Respondent does not dispute that finding. However, the respondent does not agree with the Administrative Law Judge that claimant's work disability amounts to 69 percent.

As required by K.S.A. 44-510e(a), Dr. Blaty was asked to give his opinion concerning claimant's loss of work tasks performing ability. He was presented with a work tasks analysis furnished by vocational expert, Jerry Hardin, at the request of the claimant and a similar analysis was made by Karen Terrill, vocational expert, retained by the respondent. Both of the vocational expert's reports were stipulated into the evidentiary record by the parties. Furthermore, both of the vocational experts in forming their opinions on claimant's work tasks loss utilized Dr. Blaty's permanent work restrictions. Dr. Blaty reviewed the reports and agreed with both of the experts' analyses. Based on the analyses of those experts, the Administrative Law Judge found that claimant had sustained a loss of work tasks of 45 percent. The parties agree that 45 percent is the appropriate work tasks loss component of the work disability test.

The disagreement, however, arises concerning the wage loss component of the work disability test. K.S.A. 44-510e(a) requires the work tasks loss to be averaged together with the "difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury." As previously indicated the claimant established he retired after the respondent placed him on layoff and he had not earned a wage following his injury. Therefore, the Administrative Law Judge found that claimant had suffered a 100 percent wage loss. The Administrative Law Judge, as required by K.S.A. 44-510e(a), averaged the claimant's 45 percent work tasks loss with his 100 percent wage loss finding claimant was entitled to a work disability in the amount of 72.5 percent. The Administrative Law Judge reduced the 72.5 percent work disability by the 3.5 percent permanent functional impairment rating found by Dr. Blaty to be preexisting as required by K.S.A. 44-501(c) and arrived at an award entitling the claimant to a 69 percent work disability.

The respondent argued the claimant has the ability to earn between \$12 and \$14 per hour post-injury within his permanent work restrictions. Accordingly, the respondent

contended that since claimant has retired and effectively taken himself out of the open labor market that wage should be imputed when determining the wage loss component of the work disability test. This would result in a work disability of somewhere between 27.5 and 34 percent instead of the 69 percent award. In support of its argument, respondent cites the Appeals Board decision of Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428 (Sept. 1995) where the Appeals Board imputed a wage to the claimant in calculating a "new act" work disability. The Appeals Board found that the claimant in Wollenberg refused a job offered by the respondent which he could have performed within his permanent restrictions. The Appeals Board, in imputing the wage to the claimant, found the public policy considerations announced in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), 257 Kan. 1091 rev. denied (1995), should also be applied to the "new act" definition of work disability contained in K.S.A. 44-510e(a).

The Appeals Board finds another factor that has to be taken into consideration in this case, that was not present in Wollenberg and Foult, is the fact claimant has taken himself out of the open labor market because he retired and is receiving retirement benefits. The 1993 amendment to the Workers Compensation Act contained in K.S.A. 44-501(h) requires a weekly deduction for the amount of retirement benefits an employee is receiving from social security or any other retirement system provided by the employer from any compensation benefit payment the employee is eligible to receive under the Workers Compensation Act. The Appeals Board has previously had the opportunity to visit this identical issue in the case of McKinney v. The Boeing Co.-Wichita, Docket No., 184,281 (October 1996). In that case, the claimant following her injury voluntarily retired from the employment of the respondent, who is the same respondent that is involved in this case. The Appeals Board found "considering both K.S.A. 44-501 and K.S.A. 44-510e, and their amendments, . . . the legislature must have intended that actual wage difference be used in the formula to determine permanent partial general disability benefits when a worker retires." There is no need to repeat in this Order the arguments and authorities contained in McKinney. The Appeals Board adopts the McKinney opinion as if fully set forth in this Order and affirms the Administrative Law Judge's finding that claimant's wage loss component of the work disability test is 100 percent.

(2) The Administrative Law Judge in applying the retirement offset, as required by K.S.A. 44-501(h), reduced claimant's weekly compensation rate of \$313 by \$196.11 per week. That weekly reduction amount was found by adding \$163.80 per month to claimant's monthly social security retirement benefits of \$686. The Administrative Law Judge obtained the amount of the social security retirement benefits from claimant's testimony. He obtained the \$163.80 per month figure from claimant's Exhibit 1 admitted into evidence at the regular hearing. That exhibit showed the monthly cost of benefits the respondent provided for the claimant. One of those costs was the \$163.80 per month figure for cost of the pension benefit.

The respondent argues the Administrative Law Judge erred when he calculated the weekly retirement offset. The respondent concludes the offset should be figured by taking

the total amount of claimant's monthly pension benefit of \$402 as provided by the respondent in addition to the \$686 monthly social security retirement benefit for a total weekly offset of \$251.08. On the other hand, claimant argued the \$163.80 per month figure as shown in Exhibit 1 admitted into evidence at the regular hearing was correct because it was the figure the respondent contributed to claimant's monthly pension of \$402. At oral argument before the Appeals Board, the parties agreed to submit a joint stipulation to the Appeals Board to clarify the amount of contribution the respondent made to claimant's \$402 monthly pension payment. The Appeals Board received the stipulation on September 6, 1996, which indicated the entire cost of claimant's \$402 monthly pension was provided by the respondent. Therefore, the Appeals Board finds the current amount of retirement offset as required by K.S.A. 44-501(h), to reduce claimant's permanent partial general disability weekly compensation, is in the amount of \$251.08 per week.

(3) The claimant, before the Appeals Board, raised the question of whether the 1993 amendment to the Workers Compensation Act contained in K.S.A. 44-501(h) which requires a retired employee's compensation benefit payments to be offset by the weekly amount the employee is receiving in retirement benefits from social security or the employer is constitutional. The Appeals Board has previously held that the constitutionality of a statute will not be addressed by the Appeals Board because administrative agencies are not empowered to determine that issue. See Redford v. ANR Freight Systems, Docket No. 192,613 (September 1996) and cases cited therein. Therefore, the Appeals Board finds the provisions contained in K.S.A. 44-501(h) should be applied as enacted.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award Administrative Law Judge John D. Clark dated March 13, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Keith R. Zinn and against the respondent, Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund, for an accidental injury sustained on July 19, 1993, and based upon an average weekly wage of \$1,079.17.

Claimant is entitled to 23 weeks of temporary total disability compensation at the rate of \$313 per week or \$7,199.00, followed by 280.83 weeks of permanent partial general disability benefits at \$313 per week less a weekly reduction of \$251.08 for retirement benefits equalling a reduced weekly rate of \$61.92 or \$17,388.99 for a 69% work disability, for a total award of \$24,587.99.

As of April 26, 1997, there is due and owing claimant 23 weeks of temporary total disability benefits at the rate of \$313 per week or \$7,199.00, followed by 173.71 weeks of permanent partial general benefits at the reduced rate of \$61.92 per week, or \$10,756.12, for a total of \$17,955.12, which is ordered paid in one lump sum less amounts previously paid. The remaining balance of \$6,632.87 is to be paid at the rate of \$61.92 per week, until fully paid or further order of the Director.

Pursuant to the stipulation, the Workers Compensation Fund is ordered to pay one-half of the award.

The remaining orders entered by the Administrative Law Judge in the Award dated March 13, 1996, that are not inconsistent with the above are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Vaughn Burkholder, Wichita, KS
Marvin R. Appling, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director